No. 2833

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE CITY OF PORT TOWNSEND, Washington,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, Colorado,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF PLAINTIFF N ERROR

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This is a writ of error to review the final judgment of the District Court of the Western District of the State of Washington, Northern Division, rendered in favor of the plaintiff below The First National Bank of Central City, Colorado.

STATEMENT OF THE CASE

This is an action at law brought by the First National Bank of Central City Colorado, against the City of Port Townsend, Washington, on certain warrants issued by the City of Port Townsend, Washington, drawn on the Indebtedness Fund of said city. Although brought as an action at law in form as for a money judgment, the object of the action is really to obtain a writ of mandamus against the city officers to compel them to levy a tax for the Indebtedness Fund of said city to provide the necessary means to pay the said warrants. Under the act of the Legislature creating said fund, entitled "An Act relating to the taxes and funds of municipal corporations having less than twenty thousand inhabitants", approved March 16, 1897, the city council of the city is authorized to make a levy for said fund not exceeding six mills on the dollar.

The case was before this court as number 1882, 184 Fed. 574, on a writ of error taken by the plaintiff below from a judgment of dismissal after the sustaining of defendant's demurrer to the complaint and

a refusal on the part of said plaintiff to plead further. This court sustained the lower court and held that the complaint did not state a cause of action, holding that the plaintiff must allege facts which in a court of the state would entitle it to a writ of mandamus, but afterwards on a petition for re-hearing the plaintiff was permitted to file an amended complaint.

After the mandate of this court was sent down, the plaintiff filed an amended complaint, and the defendant answered after its demurrer to the amended complaint was overruled. The plaintiff replied, and upon the issues thus made, the case was tried by the Court without a jury, a stipulation waiving a jury trial having been duly filed by the parties before the trial. (Record, p. 109). The parties also signed and filed a stipulation of facts (Record, p. 137), and upon this stipulation of facts and the other evidence submitted according to such stipulation, the case was submitted to the Court.

The Court rendered an unconditional money judgment in favor of the plaintiff for the full amount of the warrants involved, at the date of such judgment. At the proper time the defendant requested special findings, the Court made such findings after both parties had proposed findings, and upon the findings so made this judgment was rendered. The defendant brings the case here on a writ of error after having a bill of exceptions settled containing all the evidence.

The warrants sued on arose as follows: During the years 1889 and 1890, the City of Port Townsend graded a number of its streets by what is known as the special assessment plan. For this purpose the city created local improvement districts embracing the property abutting upon the improvements, had the improvements made in each district by contract as provided by law and the ordinances of said city, levied special assessments on the property included in each local improvement district, created a special fund in each district, and in payment of the work thus done issued warrants drawn on the local improvement funds in each district and delivered them to the contractor in payment of his contract. These warrants and all warrants of a similar origin have long and generally been known in the State of Washington as Street Grade Warrants and they will be so designated in this brief.

The assessments so made were not all paid and as a result a large amount of the street grade warrants remained unpaid. The holders of these street grade warrants brought suit on them against the city in the superior court of Jefferson County, the county in which said city of Port Townsend is located. In the first nine of the suits so brought, the city appeared by its city attorney and contested the same, as it appears from the face of the record, but the defendant contends that such contest was bona fide only up to a

certain stage in the progress of the suits, and that judgment in at least eight of these cases was finally taken by consent. Four of these cases were commenced the latter part of the year 1893 and the other four of the eight that were tried together in 1895 and the last of the nine cases mentioned was commenced in 1897. This last case was disposed of in the case of *David Perkins vs. Intermela* and need concern us no further.

The history of the progress of the first eight cases was briefly as follows: The city's demurrer to the second amended complaint in each of the first four of these cases, brought on such street grade warrants was sustained below for want of facts. Upon the sustaining of the demurrers to the second amended complaints, the plaintiffs refused to plead further and the cases were dismissed. From this judgment of dismissal appeals were taken to the supreme court of the state. The supreme court reversed the judgment of dismissal and held the second amended complaints in these cases good. In one of these cases, that of the *Bank of British Columbia vs. Port Townsend,* the supreme court wrote an opinion which is found in the 16 *Wash.* 450. The other three cases according to stipulation, as it appears from the reported cases, were disposed of in the same manner as the Bank of British Columbia case, 16 Wash. 701-2.

These cases were all reversed by the supreme court as stated, and the lower court was instructed to overrule the demurrer and they were sent back for further proceedings. The opinion in the Bank of British Columbia case was rendered as appears from the reports February 11, 1897. The effect of the decision in this case was to hold incidentally at least that the second amended complaint states a cause of action against the city.

The other four cases were allowed to rest meanwhile, so that when these four cases were sent back for further proceedings, the eight cases were pending in the superior court and undisposed of. During the latter part of the year they all became active and were disposed of. They were all tried, according to the records of the superior court, defendant's exhibit 1, record p. 195, on Saturday December 18, 1897, and judgment in all of the cases was immediately announced in favor of the plaintiffs (Record, p. 201). Findings in all the cases were signed on January 19th and 20th, in four on the 19th and in the other four on the 20th. In the first four the judgment was also signed on January 19, but neither the findings nor the judgment in said cases were filed with the clerk until February 1st following. The findings in the other four cases were filed on February 2nd and the judgments in such cases were signed and filed February 5th. No appeal was taken in any of these eight cases.

On February 15, 1898, the city council met in regular session according to ordinance, at which said meeting a notice was read, a "notice of Atty's in Street Grade Warrant cases" (Exhibit B, record, p. 191). After the reading of such notice and the transaction of other business in no way connected with said cases, the city council took a "recess" till 3 o'clock P. M. February 16, 1898. (The minutes uses the word "recess" but defendant contends it was an adjournment.) The next day the full council met pursuant to this recess (so called) and the only matter discussed was the payment of these street grade warrant judgments, and a proposition was made by the city council to pay these judgments in warrants drawn on the Indebtedness Fund of said city bearing six per cent interest instead of ten, the interest the street grade warrants and the judgments bore. This proposition was put in the form of a resolution and made as an offer to the judgment creditors, and then the council took another "recess" (adjournment according to defendant's contention) to meet the following day February 17th. At this last meeting the judgment creditors accepted the proposition and the council ordered the warrants drawn on the Indebtedness Fund of said city and were delivered to the judgment creditors in payment of the judgments. A copy of the minutes of February 15th is found at page 188, *et seq.* (Exhibit B); a copy of the resolution adopted at page 144, and a

copy of the acceptance by the judgment creditors at page 145, of the record. The record does not show that any action whatever was taken in regard to the notice that was read at the regular meeting held on the 15th, relating to the street grade warrant cases.

All these judgments together, including the judgment in the Alonzo Elliott case which was disposed of in the Intermela case, amounted to over $67,000, and warrants to this amount were issued to the judgment creditors mentioned in the resolution at page 144 of the record. Part of the warrants involved in this suit were issued in part satisfaction of the judgment so obtained by the Bank of British Columbia and the remainder in part satisfaction of the judgment so obtained by the Manchester Savings Bank.

The decisions of the supreme court of the State, it may be admitted, were not always consistent up to July 9th, 1897, on the question whether the city was liable on street grade warrants. But before any of the street grade warrant cases herein mentioned went to judgment, the supreme court of the state had definitely decided the law in Washington, to be that cities cannot be held generally liable on street grade warrants. This decision was made on July 9, 1897, in the case of the *German-American Savings Bank vs. Spokane,* 17 Wash., 315, hereinafter to be known as the Spokane case. This decision was thus rendered nearly seven months before these judgments were

taken, and more than five months before the cases were tried.

There is testimony to the effect that this decision was known at least to the legal department of the city and to some of the attorneys who conducted the street grade warrant cases against the city, in the fall and winter of 1897. The testimony of Mr. Coleman is direct and positive to the point that he gave the members of the city council advice as to the liability of the city based on this decision, after the street grade warrant judgments were rendered, but before they were paid (Record, p. 164).

The defendant city after a general denial of certain allegations in the amended complaint, which it will not be necessary to note specifically here, set up in its answer certain affirmative defenses and attacked the legality of the warrants in suit on the following grounds briefly stated:

1. That the superior court had no power to render the street grade warrant judgments against the city on the causes of action set forth in the complaints in said causes; that said judgments and the warrants issued in payment of the same were a fraud against the taxpayers; that the defense interposed by the city officers in the street grade warrants were not bona fide, and that the judgments were really taken by consent.

2. That all of the warrants involved in this

action were ordered by the city council at an adjourned meeting of the council and not at a regular meeting of said council as required by law.

3. That at the time the said street grade warrant judgments were taken and at the time the Indebtedness Fund warrants were issued, the city of Port Townsend was in debt beyond its constitutional limitation.

4. That this action has not been commensed within the time required by law.

ASSIGNMENT OF ERRORS

Errors relied on by the plaintiff in error for a reversal, assigned in the order in which they will be argued.

1. The Court erred in overruling defendant's objection to the introduction of the warrants involved on the ground that the said warrants are not endorsed properly to show title in the plaintiff.

2. The Court erred in rendering judgment for the plaintiff below on the findings made by the Court, because the findings do not support the judgment.

3. The Court erred in rendering an unconditional money judgment against the city without limiting the same to payment out of the indebtedness fund on which the said warrants are drawn and out of which they are payable under the law creating the said fund and

under the contract authorizing the issuing of the same, and also, in including in the said judgment interest on the said warrants to the date of the judgment.

4. The Court erred in making the 18th finding of fact which read as follows:

"18. There is now due to the plaintiff from the defendant upon the warrants enumerated in the seventh findings, thirteen thousand, nine hundred fifty-two dollars, eighty cents ($13,952.80), with interest at six per cent per year on six thousand seventy-two dollars ,eighty cents ($6,072.80) thereof from February 18, 1898, and on seven thousand, eight hundred eighty dollars ($7,880.00) thereof from February 19, 1898." (Record, p. 116-117.)

The objection to this finding is that it is a conclusion of law and it is capable of a double construction. If taken as a finding of fact as such it is contrary to the evidence and not supported either by the evidence or the pleadings in the case.

5. The Court erred in overruling the demurrer to the amended complaint, the said demurrer having been interposed on two grounds: 1. On the ground that the said amended complaint does not state facts sufficient to constitute a cause of action. 2. On the ground that the said action has not been commenced within the time required by law. (Record, p. 22.)

6. The Court erred in failing and refusing to find and hold generally from the pleadings and the evidence introduced, that the warrants are outlawed

and that no suit can be maintained thereon at this time for the purpose disclosed by the record, the record showing that the cause of action arose more than ten years before the commencement of this action, and more than thirteen years before the filing of the amended complaint herein.

7. The Court erred in not holding generally all the warrants involved in this suit illegal and void, because issued at a time, and authorized to be issued by virtue of an order and resolution passed at a time, expressly prohibited by the laws of Washington, that is, at an adjourned regular meeting of the city council.

8. The Court erred in not holding the street grade warrant judgments as judgments rendered by consent and fraudulent and void as against the taxpayers of the city, and in not holding the warrants drawn on the Indebtedness Fund of said city in satisfaction thereof, likewise fraudulent and void as against the taxpayers of said city.

And in this connection the Court erred in making the 14th finding of fact which reads as follows:

"14. There was no fraud or fraudulent collusion or acquiescence in the payment of an unlawful claim, on the part of the mayor and City Council in authorizing the payment of said judgments by said warrants, disclosed by the evidence, or in the acts of the Mayor and City Clerk in issuing said warrants."

This is a conclusion of law, but taken as a finding of fact it is contrary to the evidence.

9. The Court erred in not holding generally and in not finding from the pleadings and the evidence that the warrants in suit were illegal and void because issued over and above the constitutional limitation of indebtedness.

ARGUMENT

1. The first error assigned is the overruling of defendant's objection to the introduction of the warrants in suit on the ground that the endorsement on the warrants is not sufficient to show title in the plaintiff, which ruling was duly excepted to by the defendant. The original warrants are in the hands of this court so that they may be easily inspected. We simply desire to reserve this objection for oral argument in case it becomes necessary.

2. The second assignment of error involves the question whether the findings made by the Court sustain the judgment.

When this cause was before this court on the former writ of error, it was decided by this court that, as no suit can be maintained in the state of Washington on a municipal warrant of any kind, but only a mandamus proceeding to compel the proper officers to do their duty as provided by law with reference to its payment or with reference to providing

the proper funds to pay, and as the United States Courts have no jurisdiction to issue a writ of mandamus, except to enforce a judgment theretofore obtained, the plaintiff had the right to maintain this action in the United States Courts for the purpose of obtaining a judgment at law so that the court could issue the writ of mandamus to enforce such judgment. The Court says:

"Since the facts alleged in the complaint herein are insufficient to show that the plaintiff in error would have a right to the writ of mandamus in a court of the state, they are insufficient to show that the defendant (plaintiff) is entitled to a judgment at law in this action."

First National Bank of Central City vs. City of Port Townsend, 184 Fed. 574.

A brief examination of the findings shows that they are not sufficient to show that the plaintiff is entitled to a writ of mandate in a court of the state.

There is nothing in these findings to show the condition of the indebtedness fund, except the finding that certain levies have been made for the fund in the past and that no levy has been made since 1908, but as this fund is to be maintained by moneys coming from other sources, these findings in themselves cannot inform the Court what the condition of the fund is, and hence one of the essentials, according to the decision in the case of *State ex rel. American Freehold-Land Mortgage Company vs. Mutty,* 39

Wash. 624, is missing. This case goes into this matter extensively and is quoted at great length by this court in sustaining the demurrer to the original complaint in this cause.

To explain more fully why these findings are insufficient, it is only necessary to note the different sources from which the Indebtedness Fund is supplied. These sources are as follows:

First, From the levy of a special tax for said fund not exceeding six mills on the dollar. This is according to the provision of section three of an act of the legislature, the title of which is set out in full in the first paragraph of this brief, which, among other things, provides: "Such municipal corporation shall levy and collect annually * * * a tax for the payment of indebtedness (if any indebtedness exists) not exceeding six mills on the dollar."

Second: Section seven of this same act gives another source from which this fund is to be replenished. This section reads as follows:

Sec. 7. All moneys collected on and after the first day of February, 1898, from taxes of the year 1896, and previous years, and from penalty and interest thereon, shall be paid into the indebtedness fund.

A third source for this fund is the proceeds of the sale of county property forfeited to the county for delinquent taxes, all of which are to be paid into the

indebtedness fund according to section nine of ordinance No. 722, a copy of which said section is set out in full on page 161 of the record. According to this section the city's share of the proceeds of the sale of county property is to be turned into this fund, whether the said property has been forfeited to the county for the taxes for the year 1896 or previous years, or whether it has been so forfeited to the county for the delinquent taxes for years subsequent to the year 1896.

The City Council is not required to make the full levy of six mills every year under this act of the legislature. In this connection the Court in the case of *State ex rel. American, Etc. Company vs. Mutty,* 39 Wash. 624, at page 626, says: The statute of 1897, which provided for the establishment of the indebtedness and current expense funds as separate and distinct funds, authorized the annual levy of a tax for the former not exceeding six mills on the dollar. Bal. Code, § 1792 (This is section three of the Act just described). The levy to the full amount of six mills annually is not mandatory, and there must be some discretion lodged with the appellants (city council) as to the amount necessary to be levied in any one year. Bal. Code, § 1794" (This is section five of the same act). This discretion is to be exercised by the city council and in so doing it is to take into consideration the whole amount of the indebtedness existing

as well as the condition of the fund, in the way of uncollected taxes and cash on hand.

The findings do not even state the amount of cash in the fund. The Court in the Mutty case at page 627 goes on to say: "It is manifest that the council should not only take into consideration the amount of the outstanding indebtedness, but should also consider it with reference to the means which have already been provided for payment, by way of cash on hand, and of previously levied and uncollected taxes."

According to the decisions of the state court then which has been followed by this court in this case, the findings do not show that the plaintiff is entitled to the writ of mandamus and hence do not show that it is entitled to this judgment. The findings show neither the amount of cash on hand in this fund nor the amount of uncollected taxes that will come into this fund, nor the amount that will be received by the city to the credit of this fund as its share of the proceeds of the sale of county property, forfeited to the county for delinquent taxes in which the city has an interest, nor the condition of the fund generally. It will be noticed that the amended complaint in order to comply with the Court's former decision, alleges the condition of the indebtedness fund, or rather purports to set forth such condition, for even this amended complaint is faulty in not alleging the amount of cash on hand, although this is admitted in

the bill of exceptions, and Judge Hanford in his memorandum decision overruling defendant's demurrer to the amended complaint uses this language:

"The allegations of the amended complaint are sufficiently explicit to show that there is a large amount of indebtedness to be provided for; that the available funds added to taxes levied and not collected, are inadequate and that the city has neglected to levy additional taxes and it is a legal conclusion that the city is derelict and subject to coercive process by a writ of mandamus."

3 and 4. These assignments of error call in question the amount of the judgment, and also assign as error the fact that the Court rendered an unconditional money judgment against the city.

The warrants in suit, if valid, are payable out of a special fund. This fund is limited. The agreement for the warrants to be drawn on this fund, consisting of a resolution of the city council making a proposition and offer and an acceptance of said offer by the judgment creditors, (Record, pp. 144, 145 and 146), after the law creating the said fund went into effect, limited the warrant holders to payment out of this fund.

By the judgment of the lower court this limited liability has been converted into a general liability. There is nothing to show on the face of the judgment that the whole amount of the judgment may not be recovered at once, whereas the only object for which the suit is prosecuted, and the only object for which

it can be prosecuted, according to this court's former ruling, is to get a judgment for the basis of a writ of mandamus to compel the city council to make a levy for the Indebtedness Fund.

The eight and ninth findings, record, pp. 112-113, show that there are outstanding and unpaid forty-seven warrants of the series of which plaintiff's warrants are a part, that stand for payment before plaintiff's warrants. These findings show that the lowest number of plaintiff's warrants involved in this suit is 49, and that warrants 3 to 48, both inclusive, are outstanding and unpaid. According to law these forty-six warrants must be paid before plaintiff's warrants are paid. The stipulation of facts contained in the bill of exceptions at page 147 of the record, shows the face value of each of these warrants, and by addition the total face value appears to be $19,639.03.

Section 3947 of Rem. & Bal. Code of Washington reads as follows:

"All county, school, city and town warrants shall be paid according to their number, date and issue, and shall draw interest from and after their presentation to the proper treasurer: *Provided, that no compound interest shall be paid directly or indirectly on any of said warrants.*"

Under this section these prior warrants drawn on the indebtedness fund do not lose their priority by virtue of plaintiff's judgment, or by virtue of

plaintiff's action to compel payment, whatever may be the outcome of said action.

"But when a judgment is recovered against the municipality on a warrant, the judgment as a general rule does not alter or destroy the priority of the holder of the warrant, or of the holders of other warrants on the fund." 2 Dill. Mun. Corp. § 854, 5th ed.

State ex rel. Polson vs. Hardcastle, 68 Wash. 548 (556-7)

Especially is this so under the laws of Washington, where no action is allowed on a municipal warrant except a mandamus proceeding to compel the proper officers to make the levy to provide the fund from which warrants are paid. Under this rule there could be no such thing as figuring the interest on a warrant to the day of judgment, and then interest on interest till the same is paid. The rule in Washington does not work out that way, and even if it would, the law expressly forbids it.

The judgment should be complete on its face and express the rights of the parties, and these rights should not be left to subsequent litigation over what the record outside of the judgment shows.

The judgment bears interest from date at the rate provided by law. This is equivalent to compounding the interest on the warrants at the date of the judgment, which is prohibited by the proviso in the above section 3947 of Rem. & Bal., the proviso

being "Provided, that no compound interest shall be paid directly or indirectly on any of said warrants."

Under this head may also be noticed the fourteenth finding set out in full in the fourth assignment of error. It will be noticed that this finding states the aggregate amount of the principal of the warrants and states from what time the interest is to be calculated, and further states that there is due such an amount together with interest thereon at a certain rate, six per cent, part of it from one and part of it from another date. The finding does not state however, that it is payable, but simply that it is due. If it was the intention of the Court to say that such amounts were due and payable at that time, then such finding is not supported either by the evidence or even by the pleadings. The proper interpretation of the finding is that the Court simply intended to express an indebtment of the city on the warrants to the amount therein mentioned, and if this is the case, then the judgment is not supported by the findings as to the amount, for the amount of the judgment is what it would be if the Court had found that such amount is due and payable at that time. This error will more particularly appear in the discussion of the next assignment of error, or rather the ground upon which the error is based will more particularly appear.

The 18th finding, states the aggregate amount of the warrants in suit together with the date from which they bear interest. If as stated before, the Court

intended to find that these warrants are due and payable at that time, then the judgment would be supported by this find in this particular respct, but the finding would not be supported either by the pleadings or by the evidence in the case and it would be a violation of this statute. On the other hand, as stated before, if the Court simply intended to find the amount of the warrants in suit, and not that such warrants are payable at that time, then the judgment as to the amount is not supported by the findings.

We must presume that the Court meant no violation of this state statute. The plaintiff is entitled to no greater rights so far as the amount that he is to receive is concerned, than he would be entitled to in a court of the State. Its rights arise by virtue of the laws of the state, and this court will simply enforce those laws in its own way, but it is entitled to no more for its warrants than it would be if payment were enforced in a court of the state by mandamus.

In the case of the *Portland Savings Bank vs. Montesano,* 14 Wash. 570, this question was before the Court. The Court granted a writ of mandamus requiring the city to exchange electric light warrants for general fund warrants, and the contention of the appellant was that the Court should have allowed interest on the electric light warrants up to the time of the exchange and ordered warrants on the general fund for the amount of such electric light warrants,

including interest. In answer to this contention the Court says:

The first claim of the appellant is that the Court should have allowed interest upon the amount found due as interest upon the electric light warrants. If this had been done the appellant would have been in a better position than he would have been in if the warrants had been drawn on the general fund in the first instance. But there was nothing in the case that tended to show that such warrants were of greater force than those drawn upon the general fund. Interest upon general fund warrants could not be compounded; and for that reason the warrants issued in place of the electric light warrants were rightfully so drawn that when paid they would amount to no more than the amount for which the electric light warrants were drawn with simple interest thereon" (p. 571).

If this judgment is allowed to stand, the city will have to pay interest on the interest that is included in this judgment from the date of judgment till paid at the rate of six per cent per annum. By reference to the fact value of the warrants in suit, it apepars that $15,025.89 of the face of the judgment is interest, and hence the city will have to pay interest on interest in round numbers on fifteen thousand dollars or nine hundred dollars annually.

5. The Court erred in overruling the demurrer to the amended complaint, the said demurrer having been interposed on two grounds: 1. On the ground that the amended complaint does not state sufficient facts to constitute a cause of action. 2. On the ground

that the said action has not been commenced within the time required by law.

Under the first ground of demurrer, we wish to call the Court's attention to the fact that no demand has been alleged in the amended complaint. The purpose of this suit is to compel the city council to make a levy for the indebtedness fund, and a demand should have been made, alleged and proved, on the city council to make the levy. The only demand alleged in the amended complaint is the demand on the city treasurer for the payment of the warrants in suit (Record, pp. 5 and 14).

The memorandum decision overruling the demurrer uses the following language: The argument in support of the demurrer appears to be based upon the single proposition that the case is not ripe for proceeding to obtain a writ of mandamus because the amended complaint fails to allege that the city has refused to make an additional levy of taxes after demand." It is the opinion of the Court that this point is not well taken. It is true that the case is not ripe for the issuance of a mandamus, but in the legal order of proceedure, the plaintiff should obtain a judgment, previous to making a demand, to be followed by an application for a mandamus."

The Court seems to have been of opinion that no demand for a levy is necessary till after judgment. But this court laid down the rule that the plaintiff

must allege facts which would entitle it to a writ of mandamus in a state court.

13 Ency. Pl. & Pr. 617, lays down the rule as follows:

"The supreme court of the United States has declared the rule imperative, that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and that it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred."

We have heretofore shown that the findings of fact do not sustain the judgment because they do not show the condition of the indebtedness fund. The amended complaint and the memorandum decision recognize the fact that it is necessary under the decision of this court in this case and of the Washington supreme court to show this condition, but the amended complaint fails to show such condition by failing to show the amount of cash on hand.

This complaint then is defective in failing to allege a refusal after demand and in failing to show the condition of the indebtedness fund by failing to show the amount of cash in it. In the case of *State ex rel. American Etc. Co. vs. Mutty,* 39 Wash. 624, in speaking of the duty of the city council in making

a levy for the Indebtedness Fund, the supreme court says:

"It is manifest that the council should not only take into consideration the amount of outstanding and unpaid indebtedness, but also consider it with reference to the means which have already been provided for payment, by way of cash on hand, and of previously levied and uncollected taxes."

6. The second ground of demurrer, the statute of limitations, has also been raised by answer, and this assignment will be discussed and argued on the facts as shown by the pleadings and evidence.

It is true as a general proposition of law that a municipal warrant in the State of Washington will not outlaw until six years after there has been notice given that there is money in the treasury to pay it. But this is nothing more than saying that the statute of limitations will not begin to run against a municipal warrant until a cause of action arises upon it. In the case of *Union Savings Bank vs. Gelbach,* 8 Wash. 497, the Court says:

"Now a warrant, under our statutes, is a promise to pay it, in its order of issue, when money applicable to it comes into the treasury; and its maturity, by analogy with a note, is the time when the treasurer gives notice of his readiness to pay it, and stops the interest."

In the case of *Potter vs. New Whatcom,* 20 Wash. 589, the Court says in relation to the same subject: "In the case at bar, manifestly the statute of limita-

tions could not begin to run until there was money in the treasury applicable to the payment of the warrants, and the holder of the warrants had such notice as would enable him to present them to the treasurer for payment."

In the case of *Cloud vs. Town of Sumas,* 9 Wash. 399, the supreme court of the State decided that no action can be maintained on a city warrant, but that the warrant holder's remedy is by mandamus to compel payment or a levy. This decision has been upheld by the subsequent decision in Washington, and this court has followed such decisions in this case as well as the case of *The Pauly Jail Building and Manufacturing Co. vs. Jefferson County,* 160 Fed. 866, so far as to allow no action on such warrant except on a showing sufficient in a court of the state that would entitle the plaintiff to a writ of mandamus.

In the case of *Quaker City National Bank vs. Tacoma, 27* Wash. 259, the Court had under consideration an action against the city for collecting money belonging to a special assessment fund on which plaintiff's warrant was drawn and diverting it from such fund. The Court decided that a cause of action against the city in such a case outlawed in three years, thus showing that there is nothing in the nature of a warrant which makes it invulnerable against the plea that the statute of limitations has run against it.

The logical conclusion from all these decisions is simply this, that the statute of limitations will begin to run against any cause of action based on a city warrant, the moment the cause of action arises, just the same as on any other instrument. Ordinarily the statute does not begin to run against it because no cause of action has arisen on it. We know of no case where the Court has held that a city warrant can be sued on during any part of a period longer than the appropriate statute of limitations.

This argument is directed principally against the possible contention that a cause of action has arisen on these warrants in any event, and that it is not necessary to show such action to take into consideration anything except the fact that there is a large amount of this indebtedness outstanding, that the city council has never made what might be called a substantial levy for this fund in view of the large amount of indebtedness existing and the levy that they are authorized to levy by law, and that no payments have been made on the same. The same allegations that would show a cause of action when this cause was commenced without taking specifically into consideration those matters which the state court says must be alleged and proved to entitle the warrant holder to a writ of mandamus, would also show that such cause of action existed in favor of the warrant holder after the city council had failed or neglected to make a substantial

levy at the first opportunity they had to do so, which according to the laws of Washington, would have been on the first Monday in October, 1898, the time that the levies are made for the different funds.

7. The seventh assignment of error involves the question whether the warrants in suit were ordered at and adjourned regular meeting of the council.

We ask the indulgence of this court and permit us to argue this point again, although it would appear that in the case of *Intermela vs. Perkins,* 205 Fed. 603, this identical point was decided against the contention of the defendant.

There are three reasons that induce us to present this point again to this court: In the first place, there is a distinction between this case and the Intermela case so far as the record is concerned. This court speaking through Judge Wolverton in the Intermela case uses the following language with reference to the meeting held on February 15, 1898: "In the present case the council met at a regular meeting, and finding itself unable to complete or transact the business in hand, took a recess, so termed, until the next day, and in like manner took another recess to another day, at which time the business in hand was completed, and the council adjourned."

It seems that the Court drew the conclusion from the record that there was so much business that the

council could not complete the same in one evening at the regular meeting without adjournment and had to postpone a part of the business till the next day. In order to bring the matter before this court clearly we have shown by the evidence in this case that this meeting held on the fifteenth of February was really a short meeting, that it was not because there was so much business at this meeting that it could not all be transacted, but because the council was not yet ready to act. (Testimony of August Duddenhausen, record, p. 169.)

In the second place, there is a Washington decision made since that time that will have a bearing on the question in case the Court should finally come to the conclusion that the meeting of February 17th was an adjourned regular meeting, and would be inclined to consider the matter not of sufficient importance to invalidate the warrants. The decision referred to is *Seymour vs. Ellensburg,* 81 Wash., 365, holding to a strict compliance of the statute with reference to the issuing and form of warrants.

In the third place, with due respect to the Court's former decision, we will ask the Court to consider this point again. The idea that the meeting of February 17th was an "adjourned regular meeting" within the meaning of the statute, or still worse for the plaintiff, an adjourned meeting of an "adjourned regular

meeting" appeals so strongly to reason that it is difficult to overcome it.

In the Stipulation of Facts, the following appears on page 143-4 of the record: "At said regular meeting under the head of "New Business" the clerk read notice of attorneys in street grade warrant cases. After the reading of such notice and the transaction of other business the city council took an *adjournment* of the meeting till three o'clock P. M. of the next day, without stating so far as the minutes of said meeting show, the object or purpose of the *adjournment.* The The council met in pursuance of said *adjournment* when all the members were again present. At said *adjourned meeting* the said council discussed the matter of paying the street grade warrants * * *. After such discussion, the following resolution was passed by the city council, and it then *adjourned* to the next day."

The statute governing the meetings of the City Council reads as follows: "The city council together with the mayor, shall meet on the first Tuesday in January, next succeeding the date of said general election, shall take the oath of office, and shall hold regular meetings at least once each month, but not to exceed one regular meeting each week, at such times as they shall fix by ordinance. Special meetings may be called at any time by the mayor, by written notice delivered to each member at least three hours before the time

specified for the proposed meeting: *Provided, however, that no ordinance shall be passed, or contract let, or entered into, or bill for the payment of money allowed, at such special meeting, or at any adjourned regular or special meeting.* All meetings of the city council shall be held within the corporate limits of the city at such place as may be designated by ordinance, and shall be public."

Dillon on Municipal Corporations lays down the following as to the powers of a municipal corporation:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensible * * *. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. *Much less can any power be exercised, or act done, which is forbidden by charter or statute.*" 1 Dill. Mun. Corp. §239, 5th ed.

How strictly the State of Washington construes the powers of municipal corporations is shown by a decision which as we have noticed before came out after the case of *Intermela vs. Perkins* was decided, the case of *Seymour vs. Ellensburg,* 81 Wash. 365.

In this case the question before the Court was whether the city of Ellensburg had exceeded its one-

and one-half per cent debt limit without a vote of the people. If certain electric light warrants that had been issued and unpaid, were valid, then the city had exceeded its limit, whereas if such warrants were not valid, the city had not exceeded its one and one-half per cent limit. The following law, §7687, Rem. & Bal. was in force at the time the warrants were issued:

"All demands against such city shall be presented to and audited by the city council, in accordance with such regulations as they may by ordinance prescribe; and upon the allowance of any such demand, the mayor shall draw a warrant upon the treasurer for the same, which warrant shall be countersigned by the clerk, and shall specify for what purpose the same is drawn, and out of what fund it is to be paid."

The electric light warrants in question were drawn according to this law in every respect except that they did not show on their face for what purpose they were drawn. The Court held them invalid, and said: "If warrants which do not specify the purpose are nevertheless valid, then any other requirement of the statute as to what the warrant shall contain might be omitted, and the statute practically nullified," p. 390.

This case is similar in principle to the one before us, only it is not so strong. Only a positive requirement of the statute was disregarded in the Ellensburg case. In the case before us, the council did that which they were expressly prohibited from doing. To refer to the rule laid down by Dillon, cited above: "All acts beyond the scope of the powers granted are void.

Much less can any power be exercised, or any act done, which is forbidden by charter or statute."

This argument proceeded so far on the supposition that the meeting at which this agreement was entered into and the warrants ordered was an "adjourned regular meeting." We have been unable to find a decision on any statute that is like ours. The Court's former decision was to the effect that the meeting held on February 17th was not an adjourned regular meeting.

The statute contains a prohibition against doing certain things at "an adjourned regular, or special meeting." This statute has a purpose and that purpose should be carefully noted by the Court. It is not at all infrequent to require acts which lead to the creation of an indebtedness to be preformed in a cerain way and to be surrounded with certain safe guards. For instance in the case of *Union Bank of Richmond vs. Commissioners of Oxford,* 119 N. C., 214; 34 *L. R. A.* 487, a case that will be discussed hereafter for another purpose, the Court decided that a certain act of the legislature involved in the case was sufficient as a railroad charter, but not sufficient to authorize a city to create an indebtedness, because the constitution provided that acts giving authority to create an indebtedness must be passed in a certain way and the legislative journals must show certain things. This is only an instance. We find many instances where consti-

tutions safeguard laws authorizing the creation of indebtedness, and also many instances where statutes contain special requirements in the regard to the manner of disbursing public funds, and the statute just cited and set out at length is simply another instance. Nothing unusual. It would, it seems, be wholly illogical, to say that the meeting of February 16th was an adjourned regular meeting, but that the meeting held on February 17th was not within the prohibition of the statute. The law uses the words "adjourned regular or special meeting," after prohibiting the matters referred to from being done at the special meetings therein provided for. The language of the statute is: "at such meeting, or at any adjourned regular or special meeting."

It will be no answer to the contention that the meetings held on the 16th and 17th were continuations of the meeting held on the 15th. All adjourned meetings are continuations of the meetings from which an adjournment is taken. That is the general idea of an adjourned meeting. In fact the language of the statute clearly indicates that or rather says so in so many words. There are two kinds of adjourned meetings spoken of: Adjourned Regular Meeting and Adjourned Special Meeting. An adjourned regular meeting can be nothing more nor less than a meeting resulting from an adjournment or a regular meeting; an adjourned special meeting can be nothing more or less than a meeting

resulting from an adjournment taken from a special meeting. An adjourned regular meeting is a continuation of the regular meeting and therefore we call it "an adjourned regular meeting." An adjourned special meeting is a continuation of the special meeting, and therefore we call it an adjourned special meeting. Now the statute comes in and says that certain things shall not be done at such adjourned regular or special meeting.

Dillon on Mun. Corp. §535, 5th Ed. uses the following language with reference to "Adjournment of Meetings."

A regular meeting, *unless special provision is made to the contrary*, may adjourn to a future fixed day; and at such meeting it will be lawful to transact any business which might have been transacted at the stated meeting, of which it is, indeed, but the continuation. Unless such be the special requirement of the charter or of a by-law, or the established or general usage, the adjourned regular meeting would not, it is supposed, be limited to completing particular items of business which had been actually entered upon and left unfinished; but might, if the adjournment was general, do any act which might lawfully have been done had no adjournment taken place."

In a note to this section it is stated: "Where a charter requires that an ordinance shall not be passed

unless it is introduced at a previous meeting of the council, it cannot be passed at an adjourned meeting. An adjourned meeting is a continuation of the same meeting. *Staats vs. Washington,* 44 N. J. L. 605, 611."

We are citing these authorities to show that an adjourned meeting is a continuation of the meeting from which the adjournment is taken; that the statute under consideration must be taken to use the expression "adjourned regular meeting" in its interpreted meaning, and that the inhibition in the statute is against doing certain acts at such adjourned meeting notwithstanding the fact that the adjourned meeting is a continuation of the meeting which has been adjourned.

It will also be noticed that Dillon in stating what may and what may not be done at an adjourned meeting is careful in each instance to qualify his statement to the effect that if no provision is made to the contrary.

It has not been questioned before and we take it for granted that it will not be question now, that the acts done by the council on the 17th of February come within the acts prohibited by this statute. The language of the statute is: Provided, however, that no ordinance shall be passed, or contract let, or entered into, or bill for the payment of money allowed,

at such special meeting, or at an adjourned regular or special meeting."

If what the city council did at these adjourned regular meetings was legal, it consisted of a proposition made by the council to the judgment creditors to compromise their judgments, and an acceptance by the judgment creditors of such proposition, and then these orders, warrants, for the payment of money issued. They not only entered into a contract, but also issued orders for the payment of money.

8. This assignment involves the legality of the judgments in part satisfaction of which the warrants in suit were issued, and as the defendant contends that these judgments were obtained in fraud of the taxpayers, it incidentally involves the question whether the court rightfully made the 14th finding of fact, which was duly excepted to (Record, p. 123, 24th exception), in which the Court found that there was no fraud or collusion or acquiesence in the payment of an unlawful claim.

The first question that arises will be the question whether the Court in this action can for any reason go back of the judgments and consider the cause of action upon which such judgments were based, or whether these judgments must be taken as *res judicata* and invulnerable against any attack whatever at this time.

The first question that naturally presents itself is whether this is a direct or a collateral attack. The supreme court of Colorado in the case of *Kavanagh vs. Hamilton,* 53 Colo. 157, 125 Pac. 512, recites what are direct attacks upon judgments, as follows:

1. By Motion; 2. By Answer and Cross-Complaint; 3. By Equitable action to cancel or enjoin its enforcement; 4. By Writ of Error; 5. By Writ of Review.

Defendant has attacked these judgments by answer in an action brought to enforce them. In the case of *State ex rel. American etc. Co. vs. Tanner,* 45 Wash. 348, the supreme court of the state lays down the rule that judgments may be directly attacked by answer in an action brought to enforce them, and that such answer takes the place of a bill in equity, and that such a defense may be interposed at any time the action to enforce is brought, that is, that the defense will not outlaw as long as the cause of action to enforce it remains. The judgments in the Tanner case were declared the result of fraud and collusion, were declared a fraud against the taxpayers, and the warrants issued in satisfaction thereof were likewise declared fraudulent and void. Yet the only thing from which the Court drew this conclusion of fraud was that the city council allowed these judgments to be taken against it by default in pursuance of an agree-

ment on a cause of action upon which the supreme court of the state had said the city is not liable.

In the case of *State ex rel. Bradway vs. De Mattos,* 88 Wash. 35, the supreme court held the judgment involved in the case void, the judgment having been based partly on street grade warrants and partly on what may have been a legitimate claim against the city. The judgment was entered by consent. The attack was made by answer in a mandamus proceeding to compel the city of Bellingham to levy a tax to pay the warrants issued in satisfaction of such judgment. This case is similar to the Tanner case in the 45 Wash. 348, except that in the latter case the judgment was alleged to have been taken by default in pursuance of agreement.

In the State of Washington, equitable defenses are allowed in actions at law, and the courts statement in the Tanner case that such answer takes the place of a bill in equity will raise the question whether in this Court, such answer will be considered in an action at law.

It will not be necessary to try to determine to what class of attacks the attack made in this case belongs. It seems that in most of the cases in which attacks on judgments have been allowed, they have not been classified, and it appears that not all could be reconciled with the rule usually laid down as to the inviolability of a judgment of a Court of com-

petent jurisdiction, where the Court has jurisdiction of the person and of the subject matter. So that the decided cases will be discussed without any attempt at classification. It seems also, that in some of the decided cases, such attacks on judgments have been allowed, because to do otherwise would have worked a great injustice and the courts have found a legal and approved way to avoid such injustice, without reference to any particular class of attacks, under which such decisions may be justified.

Ever since the decision in the case of the *German American Savings Bank vs. Spokane,* 17 Wash. 315, decided on July 9, 1897, no case has been decided in the state of Washington where a recovery was allowed on street grade warrants as such, and as far as our search goes, no judgment obtained on such street grade warrants that has ever come before the Court has been allowed to stand against an attack. The Supreme Court in the Tanner case, 45 Wash. 348, decided January 15, 1907, in speaking of this question, after citing numerous cases in Washington, says:

"Few principles seem to be better established by the decisions of this Court, if repeated decisions shall be taken as emphasizing the law upon a given subject, than that the general taxpayers of a city shall not be made liable for the class of indebtedness sought to be enforced here. The reasons are set forth in the decisions and need not be repeated here."

Since then numerous other decisions have been added to this line and it is not necessary to cite any

further decisions, because in the state of Washington, so far as state decisions go, the question is no longer in dispute.

If this Court will hold the city liable in this case it will be the only city in the state as appears from the decisions that will be so held liable. The supreme court of the state so far has declared that the city is not liable in the cases that have already been decided.

The adjudicated cases will now be examined to see if there is not some legitimate and well recognized reason for going back of these judgments involved in this case and to consider the cause of action upon which they are based.

In the first place, it will be necessary to examine the facts and circumstances surrounding the granting of these judgments with special reference to this particular assignment of error.

Up to the time the case of the *German American Savings Bank vs. Spokane* was decided on July 9, 1897, it may be admitted that the defense of the street grade warrant cases then pending was bona fide. It is difficult to believe, however, that such was the case after this decision came out. The trial or pretended trial of the eight cases occurred on December 18, 1897. There is positive testimony that at least the legal department of the city and the attorneys for the warrant holders knew of this decision in the

fall of 1897 and winter of 1898. But even without this testimony, which we do not wish to urge strongly upon the Court, the Court is justified in assuming that the city officials did know and that the attorneys of the street grade warrant holders did know.

The eight cases apparently contested were all tried in one day (Exhibit 1, record p. 195). Over one hundred exhibits were introduced in the first five cases tried, according to the record (Exhibit 1, record p. 195 *et seq.*) and each of the other three cases was noted as being the same as one of the others there designated (same exhibit). Notwithstanding the complicated record, judgment in favor of the plaintiff in all the cases was announced immediately after the trial. The record does not show any arguments of counsel, that is, exhibit 1, referred to does not show such argument. The rendering of these judgments at this time is difficult to explain, unless after the exhibits were all introduced or may be before; there was a consent on the part of the city attorney to the granting of the judgments.

On the 19th of January, 1898, findings in four of these cases were signed by the Court and on the 20th the findings in the four other cases were signed by the Court, but none of them were filed with the clerk till February 1st following. The judgment in four of these cases were likewise signed on January 19th but not filed with the clerk till February 1st fol-

lowing. The judgments in the four other cases were signed and filed with the clerk on February 5th.

After these judgments were so taken and before they were paid and before the time for appeal had expired, the city council took the advice of Mr. A. R. Coleman, in practice as an attorney for over forty years, and at that time the most prominent attorney of Port Townsend. He advised them that they had a good defense to the said actions, and his advice was so given after a few days consideration of the question in which time he examined the Spokane case. He advised them that they could defeat all of the cases on appeal. Notwithstanding this advice the city council ordered the judgments paid, and issued Indebtedness Fund warrants in order to do so. (Mr. Coleman's testimony, record p. 163.)

In this connection we wish to ask the Court to take judicial notice of the fact that all important cases are appealed to the supreme court, especially in the state of Washington, and that a payment of such judgments as these under the circumstances surrounding these cases without appeal even though the said judgments amounted to only a tithe of these judgments, would argue a special case. But add to this, the fact that these judgments together amounted to over sixty-seven thousand dollars, when the whole constitutional debt limit was in round numbers only seventy-five thousand dollars, it is difficult to escape

the conclusion that there must have been something in these cases that does not appear on the face of the record, and that the Court could at least draw the conclusion of fraud against the taxpayers, even though the Court should find that there was no fraudulent intent on the part of the officers of the city in paying these judgments.

If it appears then that these judgments must have been entered by consent on the part of the city officers, according to the authorities, the city may go back of them and show that they are based on a claim upon which the city was not liable.

State ex rel. Bradway vs. De Mattos, 88 Wash. 35.
State ex rel. American etc. Co. vs. Tanner, 45 Wash. 348.
Kelly vs. Milan, 127 U. S. 139; 32 L. Ed. 77.
Union Bank of Richmond vs. Commissioners of Oxford, 119 N. S. 214; 34 L. R. A. 487.

In the De Mattos case, the first one cited above, the Court analyzes the case and then states the questions involved in the following language:

"The answers to two questions must be determinative of this case upon the merits. (1) Were the several judgments, in partial payment of which the warrants here in question were issued, illegal and void because of the inclusion therein, and in the agreement upon which they were based, of street grade warrants for which the city officials had no power to assume on behalf of the city a general liability. (2) Can we go behind the judgments themselves to determine the facts which would avoid the judgments,

or are the judgments *res judicata* as to every defense which might have been raised in the original suits against the city of Fairhaven?" p. 41.

In this case a consent judgment against the city was involved, and such judgment by consent included street grade warrants as a cause of action together with legitimate claims against the city. The Court held the whole judgment void and said:

"Unless precluded by the principles of *res judicata* from looking beyond the face of the judgments, we are constrained to hold that these judgments were void because the consideration of the compromise was inextricably mixed with an illegal element, in that, as a part of the compromise, the city officials assumed on behalf of the city payments which they had no power to assume, by including in the compromise warrants upon which there could be no bona fide claim that the city was liable, hence not a legal subject of compromise. *State ex rel. American Freehold-Land Mortgage Co. vs. Tanner,* 45 Wash. 348, 88 Pac. 321." p. 43.

Again the Court says: "The Court found and so do we, that the city officials in making the settlement were actuated by no bad motive. The Court also found and so do we, that they so far exceeded their powers as to taint the settlement and judgments with constructive fraud. This, though less reprehensible, can be no less fatal than actual fraud." p. 44.

The Court continues on the same page: "The appellant strenuously insists that, when it is sought to enforce a consent judgment, the Court can look no further than the allegations of the complaint in the action in which it is entered, and if it states any cause of action, the inquiry is concluded; that a consent judgment, like other judgments, is *res judicata* of everything which might have been litigated in the action had it been contested. That might be true

where no fraud, either in fact or law, is alleged in the answer as entering into the settlement on which the consent judgment was founded. Such at least, is the rule touching mere default judgments founded on no agreement to suffer default or other actual consent (*Harshman vs. Knox County,* 122 U. S. 306), or where on a trial a defense is not made which might have been made (*Smith vs. Ormsby,* 20 Wash. 396, 55 Pac. 570, 72 Am. St. 110). But where, as here, such fraud is alleged as a defense against the enforcement of the judgment, that defense is equivalent to a direct attack on the judgment, and as such throws the whole settlement open to inquiry, and when, as here, it appears that there was an element entering as a recognized consideration into the settlement which could not on any sort of complaint have been a valid element in a cause of action because neither a legal nor a moral liability on the city's part, and where it further appears that this fact must have been known at the time of compromise, as in this case it must have been by reason of the prior decisions of this Court, then the settlement is tainted with fraud in law and the judgment by consent thereon is void. Such is the necessary result of the holding of this Court in *State ex rel. American Freehold-Land Mortgage Co. vs. Tanner, supra.* The appellant concedes that such would be the result if actual fraud be proved by clear and convincing evidence, but we know of no rule which marks any difference in this regard between actual fraud and constructive fraud."

The other cases cited above and many more that might be cited, sustain this idea that a judgment rendered by consent against the city, where the city officers had no authority to bind the city on the cause of action upon which the judgment is based, does not bind the taxpayers, the real principals, and the city can afterwards in an action to enforce such judgments go behind the judgments and show that the

judgments are based on a claim on which the city is not and cannot be held liable.

On the other hand, if the Court concludes that the record in the cases in which the street grade warrant judgments were rendered show that such judgments were not consent judgments, and that this record has not been overcome by competent proof, or that no evidence can be received for the purpose of contradicting this record, or in other words if the Court concludes that the street grade warrant judgments were not consent judgments, we still have good authority to go behind these judgments and show that they are based on no claim on which the city can be held liable.

We cannot expect to find cases that are exactly like the one before the Court. Our complex civilization gives rise to new questions daily, and courts will not refuse to administer justice in any particular case, because no adjudicated case can be found exactly similar to the one before the Court.

In the case of *Ward vs. Joslin,* 186 U. S. 142, 46 L. Ed. 1093, a stockholder was permitted to go behind the judgment against the corporation and show a want of power in the corporation to make the contract on which the judgment was based. This was done under a law and in a jurisdiction where judgments against the corporations on valid claims were held conclusive against the stockholder.

The law under which this decision was made reads as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liability shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

The judgment on which the stockholder was sought to be held liable was obtained on a guaranty by the bank. The stockholder was allowed to show that the corporation had no authority or power to enter into the particular guaranty, although it was evident that the corporation could guaranty such paper if negotiated in the transaction of its legitimate business; that the guaranty was not made in the course of transacting its business as a corporation, and that the particular case was not one falling within the exception in favor of railroad corporations and corporations for religious or charitable purposes.

The law under which the corporation was organized contained the following provision:

"No corporation created under the provisions of this act shall employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its incorporation."

In the course of the decision, Chief Justice Fuller said:

"Whether in this case the corporation would have been estopped if it had made the defense of *ultra vires*,

it did not make it, and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas constitution. *Hancock National Bank vs. Farnum*, 176 U. S. 640, 44 L. Ed. 619, 20 Sup. Ct. Rep. 506. But we did not there hold that it was not open for a stockholder to show that the judgment was not enforcible against him when rendered against the corporation on a contract beyond its power to make."

To like effect is the case of *Schrader vs. Manufacturer's Nat. Bank,* 133 U. S. 67, 33 L. Ed. 564. In noticing this case in the opinion in the case of *Ward vs. Joslin, supra,* Chief Justice Fuller says: "In *Schrader vs. Manufacturer's Nat. Bank,* * * *, it was ruled, that although the individual liability of the stockholders of a national bank, as imposed by and expressed in the statute, was for all its contracts, debts and engagements, 'that must be restricted in its meaning to such contracts, debts and engagements as have been duly contracted in the ordinary course of its business;' and that a judgment recovered against the bank in a suit commenced some years after it went into liquidation 'was not binding on the stockholders in the sense that it could not be re-examined'." p. 1099.

In case of the *Union Bank of Richmond vs. Commissioners of Oxford,* 119 N. C., 34 L. R. A. 487, the Court had under consideration the question whether it could go back of a consent judgment and hold certain railroad aid bonds invalid. The action was a mandamus proceeding to compel the levy of a tax to pay the bonds. The case arose as follows:

The town of Oxford on a proposition submitted, voted to subscribe $40,000 to the stock of a railroad company. Afterwards the town refused to issue the bonds and a suit was brought compelling it to do so. While the suit was pending a compromise was entered into between the town and the railroad company and a judgment was drawn requiring the issuance of $20,000 of the bonds. The bonds were issued and delivered to the railroad company and afterwards purchased by the plaintiff in the case. Afterwards the town refused to recognize the validity of the bonds and this action was brought to compel it to do so.

The case was before the supreme court of the state twice. On the first trial below the plaintiff was non-suited on the ground that the charter of the town did not authorize the election under which the $40,000 bonds were voted. The supreme court set this non-suit aside and agreed with the lower court that the charter of the town did not authorize the election, but at the same time held that the law chartering the railroad company on its face did authorize the election, and hence the non-suit was set aside and the case was sent back for trial.

When the second trial was had below, the point was made for the first time that the act chartering the railroad, which the supreme court held authorized the election, while good as a railroad charter, was invalid under the constitution as an act authorizing the

creation of an indebtedness on the part of the town, the same not having been passed in the manner providing for the passage of acts authorizing cities to create indebtedness.

The question considered and decided by the Court was whether it could go back of the consent judgment and examine into the validity of the bonds and also whether the former decision of the supreme court setting aside the non-suit would not prevent the Court on this appeal from considering such question.

This is an important case for the position taken by the defendant in this action, not only on the question whether this Court can go back of the street grade warrant judgments and consider the cause of action on which such judgments are based, but also on the question as to the effect the fact has, that the case of the *Bank of British Columbia vs. Port Townsend,* had already been to the supreme court of the state, and that Court had held, incidentally, at least, that the second amended complaint states a cause of action.

The Court goes into the validity of the statute chartering the railroad company as an act authorizing the town to create the indebtedness, and concludes that the act was good as a railroad charter, but was not good as an act authorizing the town to create an indebtedness, because not passed as required by the constitution for the passage of such acts. The Court also decided that it could go back of the consent judg-

ment and their own decision setting the non-suit aside, and consider the validity of the bonds; that the bonds are invalid, and that the plaintiff is not entitled to the writ of mandamus.

The Court cites many cases to show that a consent judgment, where the consent is given by parties in their representative capacity, is not *res judicata,* where such parties did not have the power to do that which they consented the Court should do in granting the consent judgment. After quoting at length from the case of *Brownsville Taxing District vs. Loague*, 129 U. S. 493, considering this a similar case, the Court says: "So even in the present case, even if the former judgment had not been by consent, it appears that there was no authority to issue the bonds, and the Court will not issue a mandamus to levy a tax to pay such judgment."

This clearly shows that while the Court was considering a consent judgment, it did not base its opinion on such fact.

In the case of *Brownsville vs. Loague*, 129 U. S. 493, 32 L. Ed. 780, the record does not show whether the judgments had been taken by consent, by default, or after contest. No importance is attached to it. They were based on interest coupons. Chief Justice Fuller in closing the decision emphasizes the lack of a cause of action in the following language:

"*Res judicata* may render straight that which is crooked and black that which is white. *Facit ex curvo rectum, ex albo nigrum; Jeter vs. Hewit,* 63 U. S., 22 How. 352 (16:345, 348); but where application is made to collect judgments by process not contained in themselves, and requiring to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the Court should not be granted when upon the face of the record it appears, not that mere error supervened in the rendition of such judgment, but that they rest upon no cause of action whatever."

The record in this case shows that the judgments sought to be enforced rest upon claims which the supreme court had definitely announced before such judgments were taken, and many times since, are not a liability against the city. In other words they are based on no cause of action whatever, and it is not necessary to go outside of the record to show the lack of a cause of action.

Of the warrants involved in this suit, those numbered, respectively, 116, 117, 118, 119, 120, 128, 129, 130, 131, 132, 133, 142, 143, 144, 145 and 146, were each issued payable to the Bank of British Columbia, in part satisfaction of the judgment obtained by said bank against the city as heretofore set forth. This case, it will be noticed, is one of those that had been in the supreme court of the state. The lower court sustained the city's demurrer to the second amended complaint, and after the plaintiff refused to plead further, the case was dismissed, and from this judg-

ment of dismissal the plaintiff appealed to the supreme court. The supreme court reversed the lower court and held that the complaint, second amended complaint, states a cause of action. The opinion of the Court was written on February 11, 1897, about five months before the case of the *German American Savings Bank vs. Spokane,* 17 Wash. 315, was decided; this last case being the one in which it was definitely decided that cities in Washington are not liable on street grade warrants, and in which the Court really recalls or overrules all decisions in conflict with it. In the Spokane case, the Court notices the case of the *Bank of British Columbia vs. Port Townsend* in the following language:

"In *Bank of British Columbia vs. Port Townsend,* 16 Wash. 450 (47 Pac. 896), while it was *in effect* held that an action would lie against the city where there was a failure to provide the fund, there was no discussion of that question. The case was disposed of on a demurrer to the complaint. Although the complaint alleged that the right to prosecute the assessment was lost, no importance was attached to it. *In fact the mooted questions were other than that as the opinion shows,* and it was held that the complaint stated a cause of action, and it was also held that, unless the contract was authorized by an ordinance there could be no recovery."

Later on in the same opinion, p. 342, it was stated that the Bank of British Columbia case should have no force or should be no authority, "except in so far as sustaining the complaint in the Port Townsend

case alluded to may have incidentally held it as the law of that case, * * *.

In the case of *Union Bank of Richmond vs. Commissioners of Oxford*, 119 N. C. 214, 34 L. R. A. 487, *supra*, the supreme court of North Carolina had taken the position on the first appeal that under a certain act of the legislature, the town had authority to issue the bonds in question. On the second appeal the defense was made that the said act was not passed as required by the constitution for the passage of laws authorizing towns to create indebtedness, and this defense was held good and the bonds declared invalid.

The principle is the same. In the Bank of British Columbia case, certain points were discussed and the second amended complaint, so far as those points were concerned, was decided to state a cause of action, but this should not close inquiry, or rather would not have closed inquiry into other defects of the same complaints, had the case gone to the supreme court a second time, and after a trial on the merits, unless "the law of the case" theory is applied with such strictness that, if followed in the North Carolina case would have put the Court in the absurd position of lending its aid in enforcing an unconstitutional statute, and in the Bank of British Columbia case, on a second appeal would have compelled the supreme court of the state to give judgment against the city on a claim which it had declared no liability against the city.

Moreover, there is good authority to the effect that after a case is sent back for trial or re-trial by an appellate court, the whole case is open for decision according to law as interpreted at that time. This is the rule in the state of Nebraska.

In the case of *Hastings vs. Foxworthy,* 45 Neb. 676; 34 L. R. A. 321, the Court considering this subject says: "Why should the rule be more stringent when the same case is up for review, the erroneous judgment still unexecuted, the parties before the Court, and the case in such a situation that by the correction of its error no injustice will be done, beyond perhaps, the creation of additional costs? If the doctrine contended for is to prevail here, then it follows that the only instance in which the Court is not permitted to correct its mistakes or refuses to do so, is also the only instance where the mistake can be corrected without injustice."

Again the Court says in conclusion: "The cause having been remanded generally, there was no adjudication of any rights between the parties; that the record presents the question upon this trial as well as upon the others, and that it is within the power of the Court to examine its former decisions, and apply the law correctly. We think that ordinarily the Court is justified in refusing to re-examine questions of law once passed upon, and that it is only where it clearly appears that the former decision was erroneous that this should be. It is however, clearly established that the former opinions in this case were erroneous, and the Court should correct the error."

In addition to the cases already cited, we wish to cite the following as cases where the Court went behind the judgment and based its decision on the cause of action on which the judgment was based.

Grauham v. Mayor of San Jose, 24 Cal. 585;
Kane v. Rock Rapids Ind. School Dist. 82;
State ex rel. Sunnerfield v. Taylor, 14 Wash. 495;
Kelly v. Milan, 127 U. S. 139;
Canal Bank v. Partee, 99 U. S. 329;
Windsor v. McNeigh, 93 U. S. 274;
Bigelow v. Walker, 109 U. S. 258;
Love v. Blauw, 48 L. R. A. 257 (Kan.);
In re Permstick, 3 Wash. 672.

Some of the cases in Washington holding cities not liable on street grade warrants of the kind and character on which the street grade warrant judgments involved in this case are based are as follows:

German American Savings Bank v. Spokane, 17 Wash. 315;
Wilson v. Aberdeen, 19 Wash. 89;
Rhode Island Mortgage etc. Co. v. Spokane, 19 Wash. 617;
Doxy v. Port Townsend, 21 Wash. 707;
Northwestern Lumber Co. v. Aberdeen, 22 Wash. 404;
Potter v. Whatcom, 25 Wash. 207;
State ex rel. Security etc. Soc. v. Moss, 44 Wash. 91;
Soule v. Ocosta, 49 Wash. 518;
Jurey v. Seattle, 50 Wash. 272;
State ex rel. American etc. Mortgage Co. v. Tanner, 45 Wash. 348;
State ex rel. Bradway v. De Maltos, 88 Wash. 35.

9. *Constitutional Debt Limit*

In the charter of the city of Port Townsend in force at the time the street improvements were made and the street grade warrants issued, there were two methods provided for making street improvements.

Section 7 of the act, laws 1881, p. 115, gives the city general power to improve streets and to collect a poll tax and also a general property tax for the purpose. Section 8 gives the city power to open up and improve streets by the special assessment plan. The two methods are distinct and it will not be denied that all the street improvements in payment of which the street grade warrants which formed the basis of the judgments involved in this suit, were all made by the special assessment plan.

When these warrants were originally issued they were not a liability against the city. They were issued in payment of the contract price of the improvements and were to be paid out of a special fund, and their issue to whatever amount could not be said to create a liability against the city and they were not to be taken into consideration in calculating the indebtedness of a city.

Baker vs. Seattle, 2 Wash. 576—approved by numerous cases decided subsequently.

A large number of improvements under this plan were made and street grade warrants in payment thereof were issued to such an extent that at the time the judgments in controversy here were taken there were outstanding warrants amounting to nearly $130,000. The assessed valuation at this time, years 1897-8, of the city was, in round numbers $1,500,000. Five

per cent of the assessed valuation, the constitutional debt limit would be $75,000. In other words the street grade warrants outstanding at the time these judgments were taken amounted to about one and two-thirds times the amount allowed by the constitution not taking into consideration the other indebtedness of the city which it is admitted was at the time already over the constitutional debt limit.

As the supreme court has decided that cities of the state are not liable at all on such street grade warrants, the Court naturally has never decided when the defense that the city is indebted beyond its constitutional debt limit should be interposed to a claim against the city on such warrants, nor has it decided at what time the indebtedness should be figured, whether at the time the street grading contract was entered into, or the time of issuing the warrants, or the time the claim is made against the city and reduced to judgment.

The complaint in the case of Manchester Savings Bank as set out in defendant's answer, paragraph 17 of the complaint Record, p. 67), alleges generally that at the time the improvement was made the indebtedness of the city did not amount to one and one-half per cent of the assessed valuation including the said warrants. Incidentally it maybe said that the warrants sued on in the Manchester Savings Bank case were issued February 11, 1889 (Record, p. 63), and the contract for

the improvement in payment of which the said warrants were issued was made October 15, 1888 (Record, p. 69), before the admission of Washington into the union as a state and when the character provisions of the City of Port Townsend were in force, in which it is provided that the indebtedness of the city shall never in the aggregate amount to more than five thousand dollars; sec. 24, laws of 1881, page 122. The warrants sued on, even their face value amounted to more than five thousand dollars. The findings of the Court follow this allegation and it is another instance to show what sort of a pretense the defense in these cases was.

In the decision in the *German-American Savings Bank vs. Spokane,* 17 Wash. 315 (320), the subject of the limitation of indebtedness is discussed and the Court says:

The first two cases (*Baker vs. Seattle,* 2 Wash. 576; *Soule vs. Seattle,* 6 Wash. 315), held that indebtedness of that character (street grade warrant indebtedness) was not a general indebtedness and that the constitutional limitation did not apply. If such claims can subsequently become a general liability against municipalities, serious complications are likely to arise, for in some instances the debt limit would undoubtedly be reached before all such claims are provided for, and there might be some question as to which of them should be entitled to priority. If the

contract in terms purported to bind the city generally and was lawfully entered into, the question should be determined with reference to the financial condition when such contract was made (*West vs. Chehalis,* 12 Wash. 369, 41 Pac. 171, 50 Am. St. Rep. 896); and the priority of the respective times of execution would be controlling in determining the question as between the various contracts, where only a part of them could be made a charge within the debt limit. Where the contract contained no such provision in that respect, and the right is founded on a breach of the contract in failing to provide the fund, a different question arises and it must decided with reference to the time either when the delinquency arose or when it should be judicially determined. Unless the latter time governs, there might be some question as to when the responsibility for the unreasonable delay becomes fixed, especially considering the fact that the city could not bind itself to provide the fund in a certain time, or in the shortest possible time as has been sometimes attempted. *Stephens vs. Spokane,* 14 Wash. 298."

This then leaves the matter in doubt, but this decision strongly leans toward the view that the indebtedness should be considered with reference to the time it may be judicially determined that the city is liable. In so viewing the matter, the indebtedness of the city should have been figured with reference to the time it was judicially determined that the city was

liable, and this would again have freed the city and would have made the whole street grade warrant indebtedness void, even if otherwise it would have been a valid debt against the city. Of course it will be answered that the judgments determined this and overruled any such defense even if it had been interposed. But the record shows that the question of the indebtedness of the city at the time suit was brought or at the time the judgments were taken was not considered at all.

We have seen, however, that according to the decisions of the following cases: *State ex rel. etc. Mortgage Co. vs. Tanner,* 45 Wash. 348; *Kelly vs. Milan,* 127 U. S. 139; *Union Bank of Richmond vs. Commissioners of Oxford,* 34 L. R. A. 487, 119 N. C. 214, that a consent judgment or decree settles nothing when the consenting party acts in a representative capacity and has no power, we might say, from the principal to do the thing he consents to. We contend that the record shows that the city council in their representative capacity of agents of the taxpayers consented to these judgments, and that consequently it could settle nothing except what they had authority to do as given to them by the laws of the state.

It is admitted that during the years 1897 and 1898, the city was indebted beyond its constitutional debt limit, and also that the indebtedness represented by the street grade warrant judgments and by the

Indebtedness Fund warrants had never received the assent of three-fifths of the voters.

10. The City can make the same defense against the plaintiff in this action as it could against the payees to whom the Indebtedness Fund Warrants were originally issued.

Union Savings Bank N *Trust & Trust Co. v. Gelbach,* 8 Wash. 497;
Bardsley v. Sternberg, 17 Wash. 243;
West Philadelphia Title & Trust Co. v. Olympia, 19 Wash. 150;
State ex rel. Olmpia Nat. Bank v. Lewis, 62 Wash. 26;
University State Bank v. Bremerton, 86 Wash. 261.

From these authorities it will clearly appear that cases involving negotiable bonds and interest coupons must be carefully distinguished from this case.

11. In the interpretation of the laws of a state the United States Courts will follow the decision of the State Courts. The case of *Green v. Neal,* 6 Pet. 291, is very similar to the case before this Court. It involved the statute of limitations in an action concerning real estate. The Supreme Court of the United States had interpreted a statute of limitations of Tennessee and had decided a second case on the authority of the first at a time when the interpretation of the statute had not been considered definitely settled, although the statute had been before the State Court a number of times. Finally, in a certain case in the State Court,

the statute was interpreted and such interpretation consistently followed thereafter, and the United States Supreme Court overruled its former decisions and followed the State Court.

The Supreme Court after citing many cases showing that it has been the practice of such Court to follow the decisions of State Courts, say:

"Quotations might be multiplied, but the above will show that this court have uniformly adopted the decisions of the state tribunals, respectively in the construction of their statutes. That this has been done as a matter of principle, in all cases where the decision of a state court has become a rule of property."

"In a great majority of the causes brought before the federal tribunals, they are called to enforce the laws of the states. The rights of the parties are determined under those laws, and it would be a strange perversion of principle, if the judicial exposition of those laws, by the state tribunals, should be disregarded. These expositions constitute the law, and fix the rule of property. Rights are acquired under this rule and it regulates all the transactions which come within its scope."

Green v. Neal's Lessee, 6 Pet. 119, 123.

Bausman v. Blunt, 147 U. S. 652, 37 Fed. 316, is to the same effect and involved the statute of limitations on a promissory note.

Both these decisions involved the statute of limitations in which the decisions of the State Court are followed strictly by the United States Courts. But decisions on other local laws are likewise followed. Municipal corporations of a state are the creatures of the statutes of the state and an interpretation of their

powers, though it may be an interpretation of many statutes instead of one, are still an interpretation of local laws, and the United States Court will follow the decisions of the State Courts.

Stone v. Southern Illinois & Missouri Bridge Co., 206 U. S. 267, 51 Fed. 1057. (This case involved the powers of a private corporation.')

Board of Commissioners, Wilkes Co. v. W. N. Coler & Co., 180 U. S. 506, 45 Fed. 642. (Rights of holders of county bonds.)

Respectfully submitted,

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